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Supreme Court of the United States

OCTOBER TERM 1934.

No. 469

HENRY L. DOHERTY & COMPANY, *Appellant,*

vs.

FRANK GOODMAN, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

APPELLEE'S BRIEF AND ARGUMENT.

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STATEMENT OF CASE.

Appellee deems necessary the following additional statement of facts:

Section 11079 of the 1927 Code of Iowa has been the law of Iowa in *haec verba* since 1873 and in substance has been the law of Iowa since 1851.

Section 3518 of the Code of Iowa 1897 provided for the beginning of actions as follows:

> "Method of service. The notice shall be served as follows: 1. By reading it to the defendant, or offering to do so in case he neglects or refuses to hear it read, and in either case by delivering him personally a copy thereof, or, if he refuses to receive it, offering to do so;
>
> 2. If not found within the county of his residence, by leaving a copy thereof at his usual place of residence with some member of the family over fourteen years of age;
>
> 3. By taking an acknowledgment of the service indorsed thereon, dated and signed by the defendant."

This section remains the law to this day except that in 1923 Paragraph 2 thereof was amended to read as follows:

> "2. If not found within the county of his residence, or if, because of his sickness or other disability, personal service can not be made upon him, by leaving a copy thereof at his usual place of residence with some member of his family over fourteen years of age, or with the person having the care and custody of him, or with the head of the family where he resides."

Doherty opened an office in Des Moines, Iowa, and maintained and transacted business in and out of said office from March 1926 to and including the date this action was begun by service on his agent King on July 30, 1931.

(Trans. Pages 11, 12, and 13) Doherty employed King as District Manager for the State of Iowa and pursuant to that employment King took charge of said office in January 1929 and was District Manager for Doherty for the State of Iowa and in charge of said office from that time to July 30, 1931. The business carried on by defendant in said office was the sale in Iowa of corporate securities and particularly the securities issued by Cities Service Company. King had supervision of all employees in the Des Moines office consisting of clerks and stock salesmen who worked out of said office and also had like supervision of offices of the defendant maintained elsewhere in Iowa. Defendant's name was on the door of said office and was listed in the telephone and city directories. The salaries of people working in the Des Moines office was paid directly from New York by defendant. (Trans. Page 13) On September 1, 1929 a duly authorized agent of the defendant working out of the Des Moines office solicited the plaintiff at Des Moines, Iowa, to purchase 15 shares of common stock of Cities Service Company and at said time and place plaintiff agreed to purchase and defendant agreed to sell said 15 shares of said stock. (Trans. Pages 13 and 14) Thereafter, on July 15, 1931, plaintiff rescinded this transaction (Trans. Pages 9 and 10) and on July 30, 1931 brought this action for the return of money paid and served notice on King, the agent, at a time when Doherty was still doing business in the State of Iowa.

The record does not show that King was an Iowan nor does it show where the contract of employment between Doherty and King was made.

ARGUMENT.

SUMMARY.

1. The sovereign State of Iowa had the power to regulate the doing of business by and through an agent. This is a method of doing business which is attended with particular attributes inimical to the economic and social welfare of the community and in the exercise of its police power the Legislature of the State of Iowa could regulate it by enacting Section 11079 of the Code of Iowa. This provided that in actions growing out of the agency, service of process might be made upon the principal by serving the agent.

2. The legislation here assailed does not violate the privileges and immunities clause of Section 2 of Article IV of the Constitution, nor of Section 1 of the 14th Amendment to the Constitution for a privilege and immunity of a citizen of the United States was not affected and the legislation is not discriminatory applying equally to citizens of Iowa as well as of other states.

3. (a) Appellant impliedly assented to the jurisdiction of the State of Iowa by sending an agent into the State and doing business through that agent long after the enactment of Section 11079.

(b) The Appellant accepted the benefits conferred by the laws of the State of Iowa and was obligated to be bound by those laws. The rights and obligations were reciprocal.

(c) Appellant expressly consented to the jurisdiction of the Courts of Iowa for the contract of employment was to be performed in the State of Iowa and the law of Iowa conferred upon the agent the power and authority to be the process agent of Appellant as to actions growing out of that agency.

I.

DOING BUSINESS WITH THIRD PARTIES BY AND THROUGH AN AGENT IS A METHOD OF DOING BUSINESS WHICH MAY BE REGULATED BY A SOVEREIGN STATE.

Business may be transacted by an individual either by himself or through the interposition of his agent. The two methods are radically different. In one, the individual deals directly with the third party, and in the other the principal may never come into direct contact or relationship with the third party. In the one case, the individual will generally be in close proximity to the third party and the place of the performance of the contract. In the other case, the principal will generally be removed from the place of the execution of the contract and the performance of its obligations. In the former case, the principle and the third party will be readily and conveniently available to respond to a claim for a breach of the contract, while in the latter case, while the third party is available to respond to a claim for a breach of the contract on his part at the place of the execution and performance of the contract, yet, generally the principal is removed at some distance, great or small, from the reach of the third party to the disadvantage of the third party. This was an inequality and an evil that the legislature of the State of Iowa sought to remove by the enactment of Section 11079. Without Section 11079 many small claims against a principal removed in distance would in a practical sense be lost. The cost of enforcing them would be greater than the returns from the litigation. To a lesser degree the enforcement of larger claims would be similarly affected. Thus, a right of a citizen would in effect be lost or lessened.

It cannot be successfully contended that the legislature of the State of Iowa lacked power to enact Section 11079

in so far as it applies to citizens of Iowa. This section has been upheld by the Supreme Court of Iowa in *Murphy v. Development Company,* 169 Iowa 542. The power of a sovereign state sometimes termed its "police power" includes all legislation and almost every function of civil government. In its broadest sense it means the power to govern. It includes all powers which a sovereign state has.

In the *License Cases,* 5 Howard 504, 12 L. Ed. 256, Chief Justice Taney said:

> "But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."

In *Mutual Loan Company v. Martell,* 222 U. S. 225, 56 L. Ed. 175, this Court said:

> "To sustain this contention it is urged that the statute being an exercise of the police power of the state, its purpose must have 'some clear, real, and substantial connection' with the preservation of the public health, safety, morals, or general welfare; and it is insisted that the statute of Massachusetts has not such connection and is therefore invalid.
>
> This court has had many occasions to define, in general terms, the police power, and to give particularity to the definitions by special applications. In *Chicago, B. & Q. R. Co. v. Illinois,* 200 U. S. 561, 592, 50 L. E. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. and E. Ann. Cas. 1175, it was said that 'the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety;' and that the validity of a police regulation 'must depend upon the circumstances of each case and the character of the regulations, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose.'
>
> In *Bacon v. Walker,* 204 U. S. 311, 318, 51 L. Ed. 499, 502, 27 Sup. Ct. Rep. 289, it was decided that the

police power is not confined 'to the suppression of what is offensive, disorderly, or unsanitary,' but 'extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people.'

In a sense, the police power is but another name for the power of government; and a contention that a particular exercise of it offends the due process clause of the Constitution is apt to be very intangible to a precise consideration and answer. Certain general principles, however, must be taken for granted. It is certainly the province of the state, by its legislature, to adopt such policy as to it seems best. There are constitutional limitations, of course, but these allow a very comprehensive range of judgment. And within that range the Massachusetts statute can be justified. Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it; and this test was applied by the supreme judicial court of Massachusetts in passing on the validity of the statute under review."

In *Murphy v. California*, 225 U. S. 623, this Court said:

"The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public."

In *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, the Court said:

"The police power in its broadest sense includes all legislation and almost every function of civil government. It is not subject to definite limitations but is coextensive with the necessities of the case and the safeguards of public interest. It embraces regulation designed to promote public convenience or the general prosperity or welfare as well as those specifically intended to promote the public safety or the public health."

The power of the state may be exercised for economic as well as for social reasons. The motives of the legislature are not subject to examination.

In *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 113, the Court said:

> "And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes."

In *Griffith v. Connecticut*, 218 U. S. 563, 54 L. Ed. 1151, it was held that the state might fix the price which may be exacted for the use of money.

In *Calhoun v. Massie*, 253 U. S. 170, 64 L. Ed. 843, it was held that the sovereign might regulate the amount of an attorney's fee.

The state may regulate insurance agents. *LaTourette v. McMaster*, 248 U. S. 465, 63 L. Ed. 362; may declare that a person who solicits insurance and procures applications therefor, or receives or receipts for money for any contract of insurance, shall be the agent of the insurance company, notwithstanding any provision to the contrary in the policy. *American Fire Ins. Co. v. King Lumber & Mfg. Co.*, 250 U. S. 2, 63 L. Ed. 810; may regulate the sale of securities. *Merrick v. Halsey & Company*, 242 U. S. 568, 61 L. Ed. 498, and may regulate the milk business. *Nebbia v. New York*, 291 U. S. 502, 78 L. Ed. 940. Countless other regulations of businesses and persons are appended to the decision in *Nebbia v. New York*.

Section 11079 was unquestionably enacted because the legislature of the State of Iowa felt that it would be a miscarriage of justice to permit a man, by means of an agent, to carry on his business at a place far distant from his

residence and then when the agent committed a legal wrong to compel the injured party to prosecute his suit at the residence of the principal. The situation is the same, whether only Iowa citizens are involved, or citizens of other states. The evil is greater when the principal's residence is removed from the State of Iowa. The cost and expense of prosecuting a suit at the residence of the principal has often consumed the fruits of recovery and has many times deterred the bringing of any suit at all, thus enabling the wrong-doer to go scot-free. Nothing could be more destructive of law and order than a system which permits a wrong-doer to escape answering for his wrong. The method of doing business through an agent frequently gives rise to practices of fraud and imposition on the community. For instance, the defendant, a citizen and resident of New York, sends his agents into far distant Iowa for the purpose of engaging in business on his behalf. The agents may or may not be financially responsible; may or may not be honest. The principal may or may not have property within the state. Permanent places of business are selected in the cities of Des Moines, Davenport and Sioux City, Iowa. From these offices the agents of the nonresident principal scatter over the State of Iowa carrying on the business of their employer. Countless people rush to buy what Doherty's agents dazzle before their eyes. Millions of dollars, through the use of this method of doing business, pour into his lap. The money received from the people of Iowa is transmitted to New York. In the process of reaping this harvest, citizens of Iowa are defrauded by these agents. They are not financially responsible. There is little or no property of the principal within the State. In the absence of remedial legislation, such as Section 11079, a citizen of Iowa may not file suit in the courts of this state. He must cross the continent and seek relief in the courts of New York. Otherwise, he is remediless. The Court will take

judicial notice that in the past decade securities were sold to countless thousands in small lots. In the case at bar, it happened to be fifteen shares of Cities Service stock valued then at $51.50 per share. The amount paid by the plaintiff totaled $150.00. Can this plaintiff, or any such plaintiff, afford to go from Iowa to New York to enforce a claim, however just, for such a small amount? For all practical purposes, unless such legisation as is embodied in Section 11079 be upheld, persons who have just claims arising from fraud or breach of contract, are, as a practical matter, deprived of their rights and Doherty is clothed with immunity from legal responsibility. What has been said concerning Doherty, a resident of New York, applies with lesser force to a resident principal living in the State of Iowa, who scatters his agents to the four corners of the state. Even in that situation, unless the claims are of considerable amount, recovery is not worth the trouble and expense involved. The difficulties in fixing responsibility upon an absent principal for the acts of his agent where this method of doing business by and through an agent is used is not imaginary but actual and real. Mr. Justice Swayne, in *Baltimore & Ohio R. R. Co. v. Harris*, 79 U. S. 681, 20 L. Ed. 354, said:

> "Here the question is whether the company was suable in the District of Columbia. In the case reported in Grattan, it was said: 'It would be a startling proposition if, in all such cases, citizens of Virginia and others should be denied all remedy in her courts, for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister state to seek redress.' The same considerations apply to the case before us. When this suit was commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress

short of the seat of the company in another state. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that Congress intended that the important powers and privileges granted should be followed by such results."

Legislation designed to promote the prompt payment of small claims and to discourage unnecessary litigation in respect to them was upheld in *Missouri, Kansas & Texas Railway Company v. Cade*, 233 U. S. 642, 58 L. Ed. 1135. Likewise, legislation imposing upon an insurance company additional damages of 12% and reasonable attorneys' fees for failure to pay a claim on a policy within a specified time, after demand made therefor, was upheld in Life & *Casualty Insurance Company v. McCray*, 291 U. S. 566, 78 L. Ed. 987. These decisions were placed upon the ground of the social needs.

We therefore submit that the legislature of the sovereign state of Iowa had the power to enact Section 11079; that it was enacted in response to a substantial evil and social need; that the means taken to attain the end were reasonable; that every citizen and resident of the State of Iowa is bound thereby, and that a nonresident individual is bound thereby, unless this legislation be stricken down by the prohibitions of Section 2 of Article IV and Section 1 of the 14th Amendment of the Constitution of the United States.

II.

SECTION 11079 OF THE CODE OF IOWA DOES NOT VIOLATE SECTION 2 OF ARTICLE IV OF THE CONSTITUTION OF THE UNITED STATES, NOR DOES IT ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES PROTECTED BY SECTION 1 OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The privileges and immunities clause of Section 1 of the 14th Amendment only protects a citizen of the United States in his privileges and immunities that arise out of the nature and essential character of the Federal Government and granted or secured by the Constitution.

Duncan v. Missouri, 152 U. S. 377, 38 L. Ed. 485.

The Slaughterhouse Cases, 83 U. S. 522, 21 L. Ed. 395.

United States v. Wheeler, 254 U. S. 281, 65 L. Ed. 270.

Section 2 of Article IV of the Constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. The purpose of this provision is stated in *The Slaughterhouse Cases*, 83 U. S. 522, as follows:

> "Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

See, also,

United States v. Wheeler, 254 U. S. 281, 65 L. Ed. 270.

LaTourette v. McMaster, 248 U. S. 465.
Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222.
Hess v. Pawloski, 274 U. S. 352, 71 L. Ed. 1091.

The right to do business in the State of Iowa is not a privilege or immunity of a citizen of the United States.

Section 2 of Article IV of the Constitution does not invalidate Section 11079 of the Code of Iowa. Because the operation of said Section applies alike to a citizen of the State of Iowa and to a citizen of the State of New York, there is no hostile discrimination against a citizen of another state. This section of the Iowa law tends to put the citizens of other states upon an equality with citizens of the State of Iowa. The right of the appellant to do business in the State of Iowa, by a means of an agent, could be burdened, regulated and restricted so long as like burdens, regulations and restrictions were put upon that method of doing business by a citizen of the State of Iowa without violating the provisions of Section 2 of Article IV of the Constitution.

We therefore submit that Section 11079 of the Code of Iowa is not stricken down by the provisions of Section 2 of Article IV nor by the privileges and immunities clause of the 14th Amendment to the Constitution of the United States.

III.

SERVICE OF NOTICE OF SUIT MADE IN ACCORDANCE WITH SECTION 11079 OF THE CODE OF IOWA CONFERRED JURISDICTION UPON THE COURTS OF THE STATE OF IOWA TO RENDER A PERSONAL JUDGMENT AGAINST APPELLANT AND SUCH ACTION DOES NOT DEPRIVE APPELLANT OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW IN CONTRAVENTION OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, NOR IN CONTRAVENTION OF THE LAW OF THE LAND.

Appellee contends that the Courts of Iowa had jurisdiction of appellant in this cause resulting from appellant sending an agent into the state and doing his business through that agent (Section 11079 of the Code of Iowa being then the law of the State of Iowa) upon the following bases:

1. Appellant impliedly consented to the jurisdiction of the courts of Iowa;

2. Appellant accepted the benefits conferred by the laws of the State of Iowa and thereby obligated himself to the burdens and restrictions of that law;

3. Appellant expressly consented to the jurisdiction of the courts of Iowa in that the law of Iowa was read into the contract of employment and conferred upon the agent the power and authority to be the process agent of appellant on actions growing out of that agency.

As a discussion preliminary to the argument on the bases above stated we wish to reply to the contention of Appellant, to wit, that Doherty had an absolute right to come to Iowa and do business in the State of Iowa and that the State could not in any way restrict him in those regards. A large number of cases have made this same statement of the law. However, each such case must be considered on its facts and upon such examination it will appear that in every such

case the court meant that a citizen of a foreign state might come into the State and do business as freely and on the same basis as a citizen of the State involved. Certainly no one would contend that a citizen of Iowa is entitled to enter the State of New York and engage in the milk business free from any restraint or that a citizen of Iowa might go to Florida or North Carolina and engage in the insurance business, the real estate business, the securities business or the liquor business, without being subject to the regulatory measures of the several states. We, therefore, submit that Doherty did not have an absolute right to come to Iowa and do business free from any restrictions whatsoever; that the measure of his right was to come to Iowa and do business under any and all restrictions and regulations that Iowa applies to its own citizens in that particular business and this means that Doherty was subject to the regulations of the State of Iowa applicable to the method of doing business by an agent.

As stated by Appellant, one of the bases of jurisdiction is physical power. However, that is not the only basis of jurisdiction. Jurisdiction is posited upon citizenship or allegiance, *Blackmer v. United States*, 284 U. S. 421; 76 Law Ed. 375, upon consent express or implied, and upon obligation.

1. This Court has held that the appointment of a process agent need not be express. It may be implied.

In *Lafayette Ins. Company v. French*, 18 How. 404, 15 Law Ed. 451 it was held that a foreign corporation which failed to give express consent to being sued in the State of Ohio was deemed to have given implied consent to the service of process upon it by serving its agent in the State. Mr. Justice Curtis in that case said:

> "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State (13 Pet., 519). This consent may be

accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.

In this instance, one of the conditions imposed by Ohio was, in effect, that the agent who should reside in Ohio enter into contracts of insurance there in behalf of the foreign Corporation, should also be deemed its agent to receive service of process in suit founded on such contracts.

* * * * *

Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the Corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the Corporation to receive service of process in suits on such contracts, and, in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behalf of the Corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the President and Directors a power of attorney to that effect. The process was served within the limits and jurisdiction of Ohio, upon a person qualified by law to represent the Corporation there in respect to such service; and notice to him was notice to the Corporation which he there represented, and for whom he was empowered to take notice.

* * * * *

We limit our decision to the case of a Corporation acting in a state foreign to its creation, under a law of that state which recognized its existence, for the purposes of making contracts there and being sued on them, through notice to its contracting agents. The case

of natural persons, and of other foreign corporations, is attended with other considerations, which might or might not distinguish it; upon this we give no opinion."

The same rule has been applied to a non-resident natural person. In *Hess v. Pawloski*, 274 U. S. 352, 71 Law Ed. 1091 a resident of Pennsylvania drove his motor car into Massachusetts and injured the plaintiff. No personal service was made on the defendant and no property belonging to him was attached. The service of process was made in compliance with the Massachusetts law which provided that the operation by a non-resident of a motor vehicle upon a public highway shall be a signification of his agreement that any process against him may be served upon the registrar of the motor vehicle. The defendant appeared specially for the purpose of contesting the jurisdiction and moved to dismiss on the ground that the service of process, if sustained, would deprive him of his property without due process of law in violation of the 14th Amendment. This was overruled and judgment rendered against him. Upon an appeal to this court the service was upheld and the Court said:

"Motor vehicles are dangerous machines; and, even when skilfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for

defense. It makes not hostile discrimination against non-residents, but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. *Canadian Northern R. Co. v. Eggen*, 252 U. S., 553, 561, 562, 64 L. Ed. 713, 716, 40 Sup. Ct. Rep. 402. The state's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Henrick v. Maryland*, 235 U. S. 610, 622, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140. And, in advance of the operation of a motor vehicle on his highway by a non-resident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane v. New Jersey*, 242 U. S. 160, 167, 61 L. Ed. 222, 226, 37 Sup. Ct. Rep. 30. That case recognizes power of the state to exclude a non-resident until the formal appointment is made. And, having the power to exclude, the state may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served. *Cf. Pennsylvania F. Ins. Co. v. Gold Issue Min. Co., supra*, 96 (61 L. Ed. 616, 37 Sup. Ct. Rep. 344); *Lafayette Ins. Co. v. French*, 18 How., 404, 407, 408, 15 L. Ed. 451, 453. The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the 14th Amendment.

Judgment affirmed."

The same rule was re-affirmed by Chief Justice Taft in *Wuchter v. Pizzutti*, 276 U. S. 13; 72 L. Ed. 446, where the Court said:

"It is settled by our decisions that a state's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140. We have further held that, in advance of the operation of a motor vehicle on its highways by a non-resident a state may require him to take out a license and to appoint one of its officials as his agent, on whom process may be served in suits growing out of accidents in such operation. This was under the license

act of New Jersey, last above referred to, and not No. 232. *Kane v. New Jersey*, 242 U. S. 160, 167, 61 L. Ed. 222, 226, 37 Sup. Ct. Rep. 30. We have also recognized it to be a valid exercise of power by a state, because of its right to regulate the use of its highways by non-residents, to declare, without exacting a license, that the use of the highway by the non-resident may by statute be treated as the equivalent of the appointment by him of a state official as agent on whom process in such a case may be served. *Hess v. Pawloski*, 274 U. S. 352, 71 L. Ed. 1091, 47 Sup. Ct. Rep. 632."

In *Stoner v. Higginson* decided November 26, 1934 reported in 175 Atl. Rep. 527 the Supreme Court of Pennsylvania upheld a Pennsylvania statute similar to Section 11079 of the Code of Iowa. In that case Lee Higginson & Company, a co-partnership, conducted its business in Pennsylvania through an agent upon whom the process was served. The contention was made that such a service deprived the defendants all that due process of law guaranteed by the 14th Amendment to the Constitution of the United States. The court rejected that contention and said:

"The next question is: Did the service of this process on these non-resident defendants by serving their designated agent deprive them of that 'due process of law' guaranteed by the Fourteenth Amendment to the United States Constitution as the United States Supreme Court has interpreted that phrase? Appellants contend that it does. Their proposition is that the service was 'not good' even if defendants had continued to do business in Allegheny County and Gilliland had continued in their employ to and including the date of service. They argue: 'The defendants were non-residents of the Commonwealth. They were not served with process. A non-resident absent individual does not become amenable to a court in Pennslyvania in an action in personam without service upon him even if he does do business in Pennsylvania through his agents or employees. Our legislature is without constitutional power to enact a statute purporting to place

non-resident individuals under the jurisdiction of our courts when such individuals are not served and are geographically beyond the reach of process. Assent to a statutory substituted or constructive service intended to create jurisdiction *in personam*, when in fact such jurisdiction does not exist, cannot be made a condition of doing business within the State. Non-resident individuals, unlike foreign corporations, are citizens and as such have an absolute right to do business in a lawful manner in every state, and submission to suit *in personam* without any effectual service of process cannot be compelled by statute.'

If appellants mean to invoke 'an absolute right to do business' in every state the answer is that they are invoking something which in the practical affairs of government is non-existent. All constitutional and statutory rights must be exercised with due regard for the regulations of the sovereign of the place of exercise. Even the so-called 'fundamental right' to life, liberty and the pursuit of happiness is not absolute but relative. If appellants mean simply to invoke the right of citizens of other states to do business in this Commonwealth 'in a lawful manner', the answer is that that right is unchallenged on this record, but the point is made that they were doing business in this Commonwealth 'in a lawful manner' only when they complied with the Fictitious Names Act of 1917 by designating an agent and by here submitting through this agent to the service of judicial process as the laws of this Commonwealth prescribe. We hold that none of these statutes infringe upon the due process clause of the Federal Constitution.

'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,' as Section 2 of Article IV of the Constitution declares. This has been interpreted as the right 'to pass through, or to reside in any other State for purposes of trade, agriculture, professional pursuits or otherwise.' See *Ward v. Maryland*, 12 Wall. 418 at 430, and *Paul v. Virginia*, 8 Wall. 168, 180. But this right is no more nearly 'absolute' than any other rights guaranteed citizens by the Federal Constitution and there are numerous examples of State regulation of federal rights,

which regulations have been upheld by the United States Supreme Court. For example, a State cannot lawfully exclude from its domain a corporation which is engaged solely in interstate commerce. But this powerlessness to exclude, does not mean powerlessness to impose fair and reasonable conditions of admission. The United States Supreme Court in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 Law. Ed. 1479, while expressly reaffirming the proposition that 'a State cannot burden interstate commerce or pass laws which amount to the regulation of such commerce' said 'this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the State which is wholly of an interstate commerce character. Such corporations are within the State, receiving the protection of its laws, and may and often do have large properties located within the State.' The Supreme Court in that case upheld the right of Kentucky to require a corporation engaged in purely interstate commerce as a condition of doing business there, to designate an agent upon whom process could be served. It *rejected* as 'novel' and without judicial support the proposition that 'as long as a foreign corporation engages in interstate commerce only, it is immune from the service of process under the laws of the State in which it is carrying on such business.'

In *Chicago, Rock Island and Pacific Railway Co. v. State of Arkansas*, 219 U. S. 453, the United States Supreme Court cited with approval the following from the opinion of Mr. Justice Matthews in *Sherlock v. Alling*, 93 U. S. 99, 'Legislation, in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution * * * And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of its citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'

In *Continental Baking Co. et al. v. Woodring, Governor, et al.*, 286 U. S. 352, 365, the Supreme Court of the United States in an opinion by Chief Justice Hughes upheld the Kansas Motor Vehicle Act as applied to interstate commerce. This act required that motor carriers of property, using public highways of the State can only do so upon condition that they obtain a license, comply with reasonable regulations, pay a reasonable license fee and a tax for expenses of highway administration and maintenance and reconstruction of the highways covered by the license, and upon the filing of an insurance policy as security against injuries to persons and property other than the passengers and property he carries, from the carrier's negligent operation. The Chief Justice said: 'Reasonable regulations to that end are valid as to intrastate traffic and, where there is no discrimination against the interstate commerce which may be affected, do not impose an unconstitutional burden upon that commerce.'

In *Hendrick v. State of Maryland*, 235 U. S. 610, the Supreme Court of the United States in an opinion by Mr. Justice McReynolds said: 'There can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce.'

A State has no more power to exclude arbitrarily from its domain individual citizens who wish to journey therein or to do business there than it has to exclude corporations engaged solely in interstate commerce. Yet it has been held that though a State cannot exclude citizens of other States, it may without infringing upon the Federal Constitution impose conditions upon admission. That individual citizens of one State who use the highways of another may be compelled by the laws of that other State to 'appoint' by their very use of those highways an official of the visited State, as their agent or attorney, upon whom process may be served with the

same force and effect as though served on them personally, provided actual notice of such service has been received by such citizens has been expressly decided. In *Hess v. Pawloski*, 274 U. S. 352, the Supreme Court of the United States held that a Massachusetts statute which declares that the use of the State's highways by a non-resident motorist shall be deemed equivalent to an appointment by him of the registrar (of motor vehicles) as his attorney upon whom process may be served in any action growing out of an accident or collision in which the non-resident may be involved while operating a motor vehicle upon such highways, and which provides for service in such case by leaving a copy of the process and a fee with the registrar or in his office, but conditions the sufficiency of the service upon the sending of notice of it forthwith and a copy of the process to the defendant by registered mail and upon his actually receiving and receipting for the same, and which allows the non-resident when so served such continuances as may be necessary to afford him a reasonable opportunity to defend the action, did not contravene the due process clause of the Fourteenth Amendment. The court declared that this statute 'makes no hostile discrimination against non-residents but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. * * * In advance of the operation of a motor vehicle on its highway by a non-resident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use.'

In *Kane v. State of New Jersey*, 242 U. S. 160, the Supreme Court of the United States in an opinion by Mr. Justice Brandies held that a State may require non-resident owners to appoint a State Official as agent upon whom process may be served in legal proceedings brought against them, and resulting from the operation of their motor vehicles, within the State, citing *Hendrick v. Maryland, supra.* In this case, Mr. Justice Brandeis said: 'There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners.'

It may be urged that a statutory requirement that visiting motorists automatically designate a State official as their attorney upon whom process may be served is distinguishable from the situation now before us in that it is merely the exercise of the State's police power in the interest of the safety of its citizens. The answer to that is that such requirements are not in their essence '*police* regulations' but *procedural* regulations. A State protects its citizens from reckless motorists *primarily* by penal laws, making the negligent operation of motor vehicles a crime. Penal laws serve the public safety better than civil procedures or regulations, for in criminal prosecutions growing out of fatal or non-fatal injuries to its inhabitants, the defense of contributory negligence is not available whereas in civil suits for damages caused by negligent operation of motor vehicles, contributory negligence is a defense. Laws like the Massachusetts statute and New Jersey statute which were reviewed in the last two cases cited, are designed by the States enacting them to enable their injured citizens to maintain actions *in their own courts* against the citizens of other States who by negligent operation of motor vehicles inflicted injuries upon them.

However, even if we regard such acts exclusively as police regulations, that view of them would not give them a constitutionally preferred status over the Pennsylvania acts now being reviewed. The United States Supreme Court in *Sligh v. Kirkwood, Sheriff of Orange County Florida*, 237 U. S. 52, said in an opinion by Mr. Justice Day, (at Page 59): 'At an early day it (the police power) was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the State. * * * The police power, in its broadest sense, includes all legislation and almost every function of civil government. * * * It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health.'

The essence of appellants' complaint is that they have been denied due process of law. This is based, of course, not on any departure from 'due process' in the course of a trial, for as yet there has been no trial; It must be based on departure from 'due process' in giving notice to appear and defend. In *Holden v. Hardy*, 169 U. S. 366, 389, the Supreme Court of the United States in referring to due process of law, said: 'No man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense.' In the case of *Wuchter v. Pizzutti*, 276 U. S. 13, which was cited by appellants, it was held that a State statute of New Jersey which provides that in actions by residents of the State against non-residents for personal injuries resulting from the operation by the latter of their motor vehicles on the State highways, service of summons may be made on the Secretary of State, as their agent, and which contains no further provision making it reasonably probable that notice of such service will be communicated to the defendants, was lacking in due process of law, because as Chief Justice Taft said in his opinion, 'The enforced acceptance of the service of process on a State officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice.' This case is clearly distinguished from the instant case because here defendants selected their own agent, and it may be fairly presumed that his was the duty of communicating to his principal the fact of service, as he actually did.

In *Washington v. Superior Ct.*, 289 U. S. 361, in which the question raised involved the validity of conditions imposed upon a foreign corporation as a prerequisite to doing business in that State, the United States Supreme Court apparently found *nothing unfair* about a provision which required a foreign corporation to appoint and register a resident agent empowered to accept service of process, etc. In that case Mr. Justice Roberts said: 'By appointing a new agent when Shaw ceased to be a resident of the State *the*

appellant could have assured itself of notice of any action.'

Appellants quote from *Pennoyer v. Neff*, 95 U. S. 714, where service was by publication, the quotation containing, *inter alia*, the following excerpt: 'Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them.' This proposition is incontrovertible and we recently expressly recognized and re-emphasized it in our opinion in *Atlantic Seaboard Natural Gas Co. v. Whitten*, 315 Pa. 529, 173 A. 305. There we also quoted the following from an opinion of the United States Supreme Court in the case of *Hollingsworth v. Barbour, et al.*, 4 Peters 466, 474: 'No man's right should be prejudiced by the judgment or decree of a Court, without an opportunity of defending the right. This opportunity is afforded, or supposed in law to be afforded, by a citation or notice to appear, actually served; or constructively, by pursuing such means as the law may, in special cases, regard as equivalent to personal service.' The case now before us is not one of a process of Pennsylvania going into another State; it is a case of process being served *in this State* on a non-resident's local agent, which service under our law is 'equivalent to personal service' on the non-resident principal. In the *Pennoyer* case, Mr. Justice Field said further: 'Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts. * * *'

Appellants rely on the case of *Flexner v. Farson, et al.*, 248 U. S. 289. This was an action brought in Illinois by the plaintiff in error upon a judgment for money rendered by a court in Kentucky. Defendants were doing business in the latter State as partners through Flexner. The defendant Farson was the only one served with a process, and he pleaded that the defendants in the former suit did not reside in Kentucky, were not served with process and did not appear, and

that Flexner was not their agent at the time of service upon him, that the Kentucky statute relied upon was unconstitutional, and that the Kentucky court had no jurisdiction and, therefore, its judgment was void. The plaintiff demurred to the pleas and stood upon his demurrer when it was overruled, whereupon judgment was entered for the defendants. The judgment of the court below was affirmed by the United States Supreme Court in an opinion by Mr. Justice Holmes, who stated: 'It is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition letting them in. * * * The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void.' We do not think it was necessary for the determination of the question of validity of service for the court in that case to decide that the Kentucky act was unconstitutional, because the plaintiff in demurring to the pleas, admitted that Flexner was not defendants' agent at the time service was made upon him. This alone rendered the service invalid and the judgment a nullity. Secondly, we believe the decision has been in effect overruled in *Hess v. Pawloski*, 274 U. S. 352. Thirdly, the decision in the *Flexner* case did not create a rule of property on which vested interests have since been based; it affected only rules of procedure and therefore, if public policy * requires its reversal, the resulting good has in it no alloy of harm.

'The eminent jurist who wrote the opinion in the *Flexner v. Farson* case said in his address, 'The Path of the Law', Harvard Law Review, Vol. X, 457: 'The language of Judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainly generally is illusion, and

repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.'

Appellate courts expressly overrule or modify their former decisions when justice requires it. See *Farmers Loan & Trust Co. v. Minnesota,* 280 U. S. 204; *Hall v. D. L. & W. R. R. Co.,* 270 Pa. 468; 113 A. 669; *Lonergan's Est.,* 303 Pa. 142, 148, 154 A. 387.

Our affirmation of the judgment of the court below is based upon the fact indicated by the evidence and found by the court that 'the cause of action arose out of a transaction of their (i. e. defendants) business in Allegheny County.' This decision is without prejudice to the defendants to renew their attack on the service should later proceedings show the cause of action did not so arise.

Our conclusions are:

First, that the statutes attacked do not abridge the privileges or immunities of citizens of the United States. A citizen of another State has no cause to complain when Pennsylvania imposes the conditions it has imposed on his doing business here, and which are precisely like those imposed on its own citizens. If a resident of another part of Pennsylvania maintained an office and agent in Allegheny County, he could be sued in that county in actions *in personam* and he

would have to respond to the process served on his agent, and defend a suit in that county though it might be hundreds of miles from his place of residence. A non-resident of Allegheny County who happens to reside, for example, in New York State has no more cause to complain of this statute than has a non-resident of Allegheny County who may reside in eastern Pennsylvania only a short distance from the New York State line.

Secondly, that appellants' claim of denial of due process of law is not well founded. In *Simon v. Craft,* 182 U. S. 427, 436, the Supreme Court of the United States in an opinion by Mr. Justice White said: 'The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form.' In *Wuchter v. Pizzutti, supra,* (276 U. S. 13), the Supreme Court of the United States in an opinion by Mr. Chief Justice Taft, after discussing several cases involving the question of due service of process, said: 'These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here.'

If, as in *Hess v. Pawloski, supra,* (274 U. S. 352), a service of Massachusetts judicial process can be obtained upon a resident of Pennsylvania in an action for damages arising from an automobile collision in Massachusetts between his car and another car, by serving an official of Massachusetts, without violating the due process of law command of the Federal Constitution, we see no reason why a writ issuing out of the Court of Common Pleas of Allegheny County, Pennsylvania, on a cause of action arising in this Commonwealth cannot be served upon residents of New York State by serving their designated agent residing in and doing business for them within the jurisdiction of that court.

The judgment is affirmed."

The rationale of the principle laid down in the cases involving foreign corporations and also the cases involving non-resident natural persons is the same; namely, that the corporation or the natural person desiring to do something which the state may lawfully prohibit or regulate, the state may permit the doing of that act on condition that the person who does do the act in question shall thereby be deemed to have agreed that some designated person shall be his agent on whom notice of suit against the principal may be served. In the case of a foreign corporation it is the power to exclude, and having the power to exclude, the state may as a condition precedent to permitting the foreign corporation to enter the state, impose the requirement that the corporation appoint a process agent within the state. In the case of a non-resident natural person it is the power of the state to regulate the doing of certain acts within its boundaries and, in the exercise of that power, to forbid the doing of those acts unless the persons doing them are willing to submit to such regulations as are reasonably necessary for the protection of the public.

If it be conceded that the State of Iowa had a right to regulate the doing of business by and through an agent by providing that in actions arising out of that agency notice might be served upon the principal by serving the agent, then this case is ruled by *Hess v. Pawloski.* If Massachusetts could say that the driving of a motor vehicle upon the highways of the state was the equivalent of the appointment of an agent upon whom process might be served in cases growing out of the operation of said motor vehicle, then Iowa could say that in cases growing out of an agency that your agent is clothed with authority to bind you by process served upon him.

The contention is made that Doherty was never physically within the State of Iowa and, therefore, Iowa could not have jurisdiction over him. We submit that that fact

is immaterial because Doherty's agent was here by his express direction and order. He was the motivating force. His agent was his *alter ego* in Iowa. The Supreme Judicial Court of Massachusetts in *Pawloski v. Hess* in the case reported in 149 N. E. 122 did not conceive that it made any difference whether Hess was in Massachusetts personally or by an agent. In that opinion appears the following:

> "This is an action of tort brought to recover compensation for personal injuries received by the plaintiff through being struck by an automobile owned by the defendant and operated by him or by someone for whose acts he was responsible."

In *Potti v. New England Road Machinery Company*, 140 Atl. 587 it appeared that an agent of the defendant was responsible for the injuries on account of his operation of a motor vehicle on the highways of New Hampshire. It does not appear that the corporation had been qualified to do business in New Hampshire. The Supreme Court of New Hampshire stated:

> "The law under which service was made provides, in substance, that a non-resident's operation of a motor vehicle on any highway within the state shall be deemed equivalent to the appointment of the commissioner of motor vehicles as his agent, upon whom may be served process in any action arising out of any accident in which he may be involved while thus operating his motor vehicle, and that such operation signifies his agreement that such process so served shall amount to personal service on him within the state, provided the commissioner mails him notice of it.
>
> The law is practically identical with one in Massachusetts, which has been held constitutional both in that state and by the United States Supreme Court. *Pawloski v. Hess*, 250 Mass. 22, 144 N. E. 760, 35 A. L. R. 945; *id.*, 253 Mass. 478, 149 N. E. 122; *id.*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091. No point is made that any constitutional question in any particular not

considered in that case is here raised, and its authority is affirmed.

The suggestion that the law requires the acceptance of an impossible condition as an actual one, because the non-resident's appointment of the commissioner as his agent is contrary to the fact, and that the law thus creates a relation when none exists fails to recognize the voluntary entrance of the non-resident on our highways as his act accepting its legal consequences, whatever they may be. The statute does not declare the commissioner's authority as given in terms by the non-resident, but describes the appointment as the equivalent in significance of express authority from the non-resident. It is made a condition of a non-resident's use of our highways with a motor vehicle that he may not be heard to deny the commissioner's authority, and the statute creates no relation contrary to the fact, but merely bars disproof of it.

In a broader way, the constitutional issue being met, any methods of service prescribed by the Legislature are valid, and do not depend upon the defendant's consent to it, whether he be resident or non-resident. And the phraseology of the legislation in describing the commissioner as the defendant's agent is not of importance."

In *Stoner vs. Higginson, Supra,* it does not appear that the individual defendants were in the State of Pennsylvania. If the presence of Doherty in the State of Iowa is at all material, it certainly must be limited to being in the State of Iowa at the time of service. Upon the theory of jurisdiction based upon physical power only, certainly no one would contend that presence in the State at a time other than the beginning of the action is material. *McDonald v. Mabee,* 243 U. S. 90. So in the case at bar Appellee is not contending for jurisdiction on the basis of physical power, but is asserting that jurisdiction is conferred on the basis of express and implied consent and obligation. It is clear that if Doherty had given his agent express con-

sent to be served with process that service upon the agent would give jurisdiction.

Contention has been made that the corporation cases are not relevant because the corporation is not a citizen. Therefore, a foreign corporation may be excluded arbitrarily by a state and a state having absolute power can attach any condition it desires to the corporation's doing business in the State. However, this theory of jurisdiction over the corporation breaks down in the face of *International Harvester Company v. Kentucky*, 234 U. S. 579. In that case the corporation was engaged solely in interstate commerce and the State had no power to prevent it from carrying on its business. Nevertheless, this court held that the corporation was amenable to judicial process within the State. Likewise as to an individual it was thought that until the decision in *Hess v. Pawloski* that an individual had an absolute right to go in and through a State without being amenable to the judicial process unless served within the State. Both of these cases sustain appellee's contention that Doherty by sending his agent into the State and doing business in Iowa impliedly assented to be bound by the laws of the State of Iowa providing for service of process upon the agent.

Charles Kellogg Burdick in 20 Michigan Law Review 424 in commenting upon *Flexner v. Farson*, 248 U. S. 289 says:

> "Yet we have seen that a reasonable regulation as to service of process upon a foreign corporation entering to engage in interstate commerce may be imposed, though the corporation cannot be excluded from the State. Similarly a regulation as to natural persons entering to do business within the State, providing for service of process upon an agent in the State where a cause of action arises within the State, would seem not to deny such persons any privilege or immunity of citizens of the State, but rather to put them on an equal footing with such citizens."

In *Pennoyer v. Neff*, 95 U. S. 714, Mr. Justice Field took pains to make clear that the decision of the court in that case did not prevent the several states from requiring non-residents under certain circumstances to appoint a process agent within the State. This portion of the opinion is quoted by the court in *Stoner v. Higginson, Supra.*

See further cases sustaining statutes similar to Section 11079 of the Code of Iowa:

Edwards v. Van Cleve (Ind.) 94 N. E. 596.

Davidson v. Doherty, 214 Iowa, 739.

Austin W. Scott in 32 Harvard Law Review, 871, at 888 states:

> "But there would seem to be no objection to a statute which forbids non-residents to do business within the state without having consented to the jurisdiction of the courts of the state as to all causes of action arising within the state and out of the business carried on within the state. Such a provision seems essentially just. Very clearly provisions allowing creditors to attach the assets employed in the business within the state are desirable and proper, and such provisions are well-nigh universal; but very frequently the business is carried on without the use of any property within the state. In such a case should a creditor of the business be bound to resort to other states to search out and discover the owner of the business? That would seem to be a hardship to the creditor. The words of Mr. Justice Swayne, speaking of the unfairness of refusing a creditor the right to sue a foreign corporation in the State where the corporation was carrying on business and where the cause of action arose, are equally applicable here. 'In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility.' On the other hand there is little hardship on the owner of the business if he is required to answer for all claims arising out of the

business in the place where the business is carried on. A statute requiring persons carrying on business within the state to consent to service of process upon an agent in actions arising within the state out of the business carried on within the state, would therefore seem to fall within the proper scope of the police power.

If a state has power to forbid a non-resident to do business without having filed a consent to service of process upon his agent, the question arises whether the state has jurisdiction in the absence of such express consent. We have seen that in the case of corporations, on one or the other of three possible theories, the Supreme Court has held that the state may acquire jurisdiction over foreign corporations doing business within the state, as to causes of action therein arising, although no consent was expressly given. How far are these three theories applicable to the case of non-resident individuals? It seems impossible to say that the non-resident is present and 'found' within the state; an individual cannot be present except where his physical body is. But it would seem that it is as easy to apply the doctrine of 'implied' consent to an individual non-resident, as to a foreign corporation. If the mere fact that a corporation does business in a state constitutes a consent to the conditions which the state may properly and does impose, it is hard to see why the doing of business by an individual is not a consent to the conditions which the state may properly and does impose. The mere fact that the state may not properly impose conditions upon individuals which it may impose upon corporations is immaterial, as long as the conditions it does impose are proper. Furthermore, if according to Judge Hand's theory, a corporation is bound by conditions imposed by the state, not because it has consented to be bound, but because by voluntarily doing business within the state it is just and proper to hold that it is bound by the reasonable regulations of that business by the state, there is no good reason why an individual should not likewise be bound."

2. Appellant accepted the benefits conferred by the Laws of the State of Iowa and thereby obligated himself to the jurisdiction and restrictions of that law.

F. Arnold Daum in 19 Iowa Law Review, Page 431 states:

> "the real basis of jurisdiction is not physical power over the defendant but it is the obligation to respect the judgment of the court which the defendant owes to the sovereign state because of the relationship existing between them. This obligation exists by reason of the defendant's act in accepting the benefits conferred by the sovereign state, and it is because of this that it is his duty to obey the judgment given by the court of such state—this, and not physical power, in its true sense, is the foundation of the jurisdiction of the court. This theory of jurisdiction is probably only the rationalization of that which the courts have been doing for some time, but it is submitted that it would be better to cease talking in terms of a power, which it has been shown does not actually exist and is at best only a fiction, and talk in terms of reality—that is, the duty or the obligation of the defendant to obey the judgment. Physical power over the defendant is now only one part of our broadening concept of jurisdiction."

In the American Law Institute's Restatement of Conflict of Laws Section 90 appears the following:

> "A state can exercise through its courts jurisdiction over an individual who has done an act or caused an event within the state, as to a cause of action arising out of such act or event, if by the law of the state at the time when the act was done a person by doing the act or causing the event subjects himself to the jurisdiction of the state as to such cause of action."

It is Appellee's contention that the doing of an act within the State by an agent imposes certain legal consequences which in this case were that process against the principal might be served upon the agent. Judge Learned Hand in

Smolik v. Philadelphia & Reading Coal & Iron Company, 222 Fed. 148 rationalizes this doctrine as being based upon the necessities of the case and in the interest of justice. He says:

> "When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the State, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.
>
> The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in *Simon v. Southern Railway, supra*, and *Old Wayne Insurance Co. v. McDonough, supra*. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and, where that meaning calls for wide application, such must be given."

This same doctrine was applied to a non-resident individual in the case of *Gesell v. Wells*, 240 N. Y. Sup. 628 (229 App. Div. 11) affirmed in 254 N. Y. 604, 173 N. E. 885. There a non-resident minor was served with notice under a New York statute in substance the same as the Massachusetts statute applied in *Hess v. Pawloski*. The contention was made that the implied agreement on the part of the minor was either void or voidable at his election and that such agreement, if any, had been repudiated by him. This contention was rejected and the Court said:

"We agree with the learned court below that the statute in question makes no distinction between a minor and an adult in respect to its operation. It operates to require any non-resident to answer for his conduct in the state to the extent of declaring that the use of our public highways by the nonresident is the equivalent of the appointment of the Secretary of State as agent on whom a summons may be served. It is an exercise of the police power of the state, reasonably calculated to promote care and accountability on the part of all who use its highways for the operation of dangerous machines such as are motor vehicles. *Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091; *Pawloski v. Hess*, 250 Mass. 22, 144 N. E. 760, 35 A. L. R. 945, *Id.*, 253 Mass. 478, 153 N. E. 478. Surely they are not less dangerous in the hands of minors. It is inconceivable that there should have been any legislative intent to exclude minors. But it is urged that the statute in question is based upon an implied agreement which, in the case of an infant, may be repudiated at his election. It would be strange if a police regulation of the state could be thus evaded.

The language of Section 285-a of the Highway Law (added by Laws 1928, c. 465), so far as material, is as follows: 'The operation by a nonresident of a motor vehicle on a public highway in this state shall be deemed equivalent to an appointment by such non-resident of the Secretary of State to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such a public highway; and such operation shall be deemed a signification of his agreement that any such summons against him which is so served shall be of the same legal force and validity as if served on him personally within the state. * * *"

The constitutionality of the statute has been well settled. *O'Tier v. Sell*, 252 N. Y. 400, 169 N. E. 624; *Hess v. Pawloski*, 274 U. S. 352, 353, 47 S. Ct. 632, 633, 71 L. Ed. 1091. A substantially identical statute in Massachusetts was considered in *Hess v. Pawloski, supra*, wherein the United States Supreme Court said: 'And, in advance of the operation of a motor vehicle on its highway by a non-resident, the state may require him to appoint one

of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane v. New Jersey*, 242 U. S. 160, 167, 37 S. Ct. 30, 61 L. Ed. 222. That case recognizes power of the state to exclude a non-resident until the formal appointment is made. And, having the power so to exclude, the State may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served.' If it is a 'constructive contract,' it is one which is absolutely binding by operation of a law passed in the exercise of the state's police power, and 'obligations and rights under the statute are not elective. They rest upon the command of the state, and not upon agreement of the parties.' *Matter of Cameron v. Ellis Construction Co.*, 252 N. Y. 394, 396, 169 N. E. 622, 623; *Smith v. Heine Safety Boiler Co.*, 224 N. Y. 9, 11, 119 N. E. 878, Ann. Cas. 1918D, 316. It is more than a 'constructive contract.' It is not contractual in a strict sense; it is an obligation imposed by the sovereign power of the state upon the act of coming into the state and using the state's highway. The obligation then becomes complete and binding because the statute so declares it. Its command and obligation cannot be evaded, disaffirmed, or repudiated because of infancy. 'When the law clothes an intentional and intelligent act with specified consequences, then the doing of that act commonly entails those consequences.' *Pawloski v. Hess*, 250 Mass. 22, 27, 144 N. E. 760, 35 A. L. R. 945. Any nonresident infant old enough to operate a motor vehicle is presumably capable of the 'intentional and intelligent act' of voluntary acceptance of the benefit of using our highways upon the condition named in the statute. He comes fairly within the scope of a statute affording a convenient method of obtaining a personal judgment against all, residents and nonresidents alike, who use our highways; and the provision of the statute is all inclusive.

The doctrine laid down in *Young v. Masci*, 289 U. S. 253, 77 Law Edition 1158 imposes the obligations of the law of the State of New York upon a New Jersey resident who permitted a New Jersey resident under a contract of bailment

made in New Jersey to drive the defendant's car into the State of New York. In that case this court said:

> "He challenges the statute only as applied to a non-resident owner who made the bailment outside the State of New York and who was not within it at the time of the accident.
>
> * * * * *
>
> Thus the essential question is the power of New York to make the absent owner liable personally for the injury inflicted within the State by his machine.
>
> When Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that State upon Balbino's negligent driving as fully as if he had stood in the relation of master to servant. A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it. Thus, liability is commonly imposed under such circumstances for homicide, *Com. v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; for maintenance of a nuisance, *State v. Lord*, 16 N. H. 357, 359; for blasting operations. *Cameron v. Vandergriff*, 53 Ark. 381, 386, 13 S. W. 1092; and for negligent manufacture. *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440, 13 N. C. C. A. 1029.
>
> The power of the State to protect itself and its inhabitants is not limited by the scope of the doctrine of principal and agent."

In *York v. Texas*, 137 U. S. 15, 34 Law Ed. 604 the State of Texas provided that an appearance for the purpose of pleading to the jurisdiction was a voluntary appearance which brought the defendant into court. The defendant served out of the State contended that this statute deprived

him of liberty or property without due process of law. The defendant entered a special appearance by his counsel challenging the jurisdiction of the court. This was overruled and judgment was rendered against him.

This court affirmed the Texas judgment and held that the provisions of the Texas statute did not violate the 14th Amendment to the Constitution.

There it appears that the defendant sent his attorney, in fact his agent, into the State of Texas for the purpose of contesting the jurisdiction. The defendant did not admit that the State of Texas had jurisdiction over him, nor did he intend to give the State of Texas jurisdiction over him by sending his agent into the State to plead for him. Neither did he consent to the jurisdiction of the State of Texas. However, the law attached certain consequences to the defendant's acts and if he did the act the results followed.

We submit that on the analogy of *Young v. Masci* and *York v. Texas,* that when the appellant sent his agent into the State of Iowa and did business through that agent, that the consequences of that act were that the law of Iowa made that agent the defendant's process agent for the purpose of actions growing out of that agency.

Maurice S. Culp in 32 Michigan Law Review 909 at 922 states:

> "The due protection of the business and economic interest of residents seems to warrant the acquisition of some measure of control over the activities of non-residents just as the policy of protecting local residents favored the authorization of service of process upon non-resident motorists in causes of action growing out of accidents within the State. The inability to secure redress in the local courts against non-resident business men is a considerable hardship upon residents; it affects a class of residents quite as large and important as the class affected by contact with non-resident motorists. There is certainly no less practical reason for allowing substituted service on the non-resident broker

in a suit for fraud practiced by his agent than for allowing such service in a suit against a non-resident motorist for personal injuries."

In *Davidson v. Doherty*, 214 Iowa 739 at 750 the Court says:

"What difference is there, under the due process clause of the Federal Constitution, between an action for damages for personal injury and an action for damages for fraud in the sale of stock? Both are strictly actions *in personam* and arise at common law. If jurisdiction can be obtained in one by substituted service on an agent, certainly it can be in the other. If such service is due process of law in one instance it can not be anything else in the other. There is no question of police power in either case. It is strictly and solely a question of 'due process of law.'"

In *Alaska Commercial Co. v. Debeny*, 144 Fed. 1 judgment had been obtained in Canada against the defendant by service upon the defendant's agent located in Canada at a time when the defendant was not in Canada, had no residence there and did not intend to return there. The applicable Canadian statute provided as follows:

"(14) Service of writ of summons shall be effected by copy, as follows: (1) By personal service anywhere in the territories; (2) in case any defendant is out of the territories, but has an agent, managing clerk, or other representative resident and carrying on his business within the same, service of the writ of summons may be made on such agent, managing clerk, or other representative. * * *"

A suit was brought in the District Court of the United States upon the Canadian judgment. The District Court held the judgment void. Upon appeal the Circuit Court of the 9th Circuit held the judgment valid and said:

"We think it clear that the evidence shows, without any substantial conflict, that A. W. Debeny was the defendant's agent and legal representative, within the meaning of the provision of the Canadian statute in question, and that the service upon him in the action there brought was a valid service, and, accordingly, that the judgment there rendered was a valid judgment. It results that the judgment of the court below must be reversed, without reference to the other questions discussed by counsel."

The Court does not precisely indicate whether the judgment was held valid upon the basis of implied consent or upon the basis of obligation, but it is fair to say that the theory in the mind of the Court from the preliminary discussion is that the judgment was valid on the theory of obligation.

We, therefore, submit that Section 11079 of the Code of Iowa being in full force and effect when Appellant sent his agent into the State of Iowa and when said agent was served that on the basis of duty and obligation to the sovereign state of Iowa growing out of the protection that the laws of the State of Iowa afforded to the defendant's business that the Appellant is bound by the service of notice upon his agent and the judgment rendered against him is valid.

3. Appellant expressly consented to the jurisdiction of the Courts of Iowa in that the law of Iowa was read into the contract of employment and conferred upon the agent the power and authority of a process agent of Appellant.

Nothing appears in the record as to the place where the contract between Doherty and King was executed. However, the place of performance was in the State of Iowa and doubtless the contract contemplated performance in the State of Iowa. At the time of the entering into of the contract and of the performance thereof Section 11079 of the Code of Iowa was the law of this State. We, therefore, assert that that section was written into the contract and con-

ferred upon the agent the power and authority of a process agent for the Appellant and imposed upon him the duties and obligations to be served with notice of suit to the extent permitted in said section.

In *Pinney v. Nelson*, 183 U. S. 144; 46 Law Ed. 125 the stockholders of a Colorado corporation who, under the laws of Colorado, had no liabilities to the creditors of the corporation were made liable under a California statute which provided that liability would be imposed upon stockholders for the benefit of creditors. The Court quoted from *Pritchard v. Norton* as follows:

> "The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation.
>
> * * * * *
>
> "Now when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California, is it not clear that they were contracting with reference to the laws of that state? Contracting with reference to the laws of that state they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the state, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other states and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California. Suppose these same stockholders in Colorado had formed a partnership with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and in incorporation of those laws into the liabilities created by the partnership business in California? And if this rule obtains as to contracts of partners between themselves, why not also as to contracts

of stockholders between themselves in forming a corporation?

* * * * *

All that we here hold is that when a corporation is formed in one state, and by the express terms of its charter it is created for doing business in another state, and business is done in that state, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business."

In *Lafayette Ins. Company v. French*, 18 How. 404, 15 Law Ed. 451 the Court said:

"Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the Corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the Corporation to receive service of process in suits on such contracts, and, in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behalf of the Corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the president and directors a power of attorney to that effect. The process was served within the limits and jurisdiction of Ohio, upon a person qualified by law to represent the Corporation there in respect to such service; and notice to him was notice to the Corporation which he there represented, and for whom he was empowered to take notice.

In *Bagdon v. Philadelphia & Reading Coal & Iron Company*, 217 N. Y. 432, 111 N. E. 1075 the defendant, a Pennsylvania corporation, appointed a process agent in the State of New York. The plaintiff having a cause of action which arose in Pennsylvania began an action in New York and served its process upon the New York agent. The defend-

ant contended that as the cause of action had no relation to business transacted in New York that the service upon the New York process agent was unavailing as the appointment was only made at the instance of the State of New York so that service could be made upon it on account of actions arising out of New York business. The court held that the service was good and said:

> "The stipulation is therefore a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person 'upon whom process against the corporation may be served'. The actions in which he is to represent the corporation are not limited. The meaning must, therefore, be that the appointment is for any action which, under the laws of this state, may be brought against a foreign corporation. The contract deals with the jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject matter. It means that whenever jurisdiction of the subject matter is present service on the agent shall give jurisdiction to the person. * * * The statute makes no provision for service on a public officer if a designation is not filed; the corporation may withhold its stipulation and carry on business legally; all that it forfeits is the right to enforce its contracts in our courts. In return for that privilege it has made a voluntary appointment of an agent selected by itself. We are not imposing or implying a legal duty. We are construing a contract."

In dealing with the same problem on a similar state of facts was dealt with by Judge Learned Hand and a like conclusion was reached in *Smolik v. Philadelphia & Reading Coal & Iron Company*, 222 Fed. 148. The Court there said:

> "The defendant here argues that the terms of such an implied consent cannot be supposed to be other than those which the state statute attempts to exact, and that if the implied consent is to be limited, as has now been indubitably done, the express consent must be limited in exactly the same way. Were this not true, the de-

fendant urges, an outlaw who refused to obey the laws of the state would be in better position than a corporation which chooses to conform. The theory of implied consent dialectically requires the same limitations to be imposed upon express consents, at least in the absence of some explicit language to the contrary in the state statute.

The plaintiffs, on the other hand, urge that the express consent of a foreign corporation to the service of process upon its agent (Section 16, General Corporation Law; Section 432, Code of Civil Procedure) must be interpreted in the light of the statutes of the state, giving jurisdiction to its own courts, and that in the cases at bar residents of New York may, under the New York Code, Section 1780, sue foreign corporations upon any cause of action whatever. While, of course, the jurisdiction of this court over the subject-matter of suits depends altogether upon federal statutes, the question now is of personal jurisdiction, and that depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state statutes. That intent being determined, there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business. Intent and power uniting in the sections in question, how is it possible to confine the provision to actions arising from business done within the state?"

Assuming that Appellee is correct in his contention argued in Division I; namely, that it was within the power of the State of Iowa to enact Section 11079, then Appellee submits that the contract between Doherty and his agent King conferred upon King the power and authority to be the process agent of Doherty and thus express consent was given by Doherty to submit causes growing out of the agency in Iowa to the Iowa courts.

ANSWER TO ARGUMENT OF APPELLANT.

I.

Appellee concedes that one of the bases of jurisdiction to render judgment against an individual is power. On the other hand, we assert that jurisdiction may be conferred by consent implied or expressed and by duty and obligation. These are argued in Division III above. Appellant says that the extension of a sovereign's jurisdiction beyond its boundaries is war. Pennsylvania did not war on Massachusetts on account of the decision of *Hess v. Pawloski* nor did New York war on New Jersey on account of the decision in *Kane v. New Jersey*. On the other hand, Kentucky did not march on Illinois because of the decision in *Flexner v. Farson*.

We submit that in this day of far flung economic and industrial enterprises, where a citizen of New York may by virtue of Section 2 of Article IV of the Federal Constitution send his agents into the forty-eight states of the Union and transact his business in each of them, that it is necessary that each of the states be permitted to regulate and restrict those agents on the same basis as they restrict their own citizens, at least to the extent set forth in Section 11079 of the Code of Iowa.

This is one nation. Each of the states is restricted to the extent set forth in Section 2 of Article IV of the Constitution and in the 14th Amendment thereto. Thereby a Federal right was given to the citizens of each State to enter into any other State and engage in business with the same rights and privileges accorded to the citizens of that State. The purpose of the privileges and immunities clause was to prevent discrimination between the citizens of the several states. To hold that a citizen of New York may have more privileges and immunities in the State of Iowa than a citizen of Iowa is to discriminate against the citi-

zen of Iowa and thus reach a result contrary to the purpose of Section 2 of Article IV of the Constitution. Thus will be promoted friction between the states and dissension within the union.

II.

Appellant depends upon a quotation from Story Conflict of Laws Paragraph 539. The quotation is sound so far as it goes, but since Mr. Justice Story wrote these words this court has decided *Hess v. Pawloski*, *Kane v. New Jersey* and *Blackmer v. United States*. Neither the text of Story nor the act of the Iowa Legislature must fall. *Pennoyer v. Neff* is cited. Mr. Justice Field in that case expressly excluded the situation which we have in the case at bar and in the case of *Hess v. Pawloski*. Assertion is made that the corporation cases are not relevant, but we believe that that is not sound. See Appellee's Division III above. Assertion is made that Massachusetts had the right to exclude Hess from its highways. We do not believe that that is the law. We assert that the limit of Massachusetts' rights was to regulate the use of its highways and to put Hess on a basis of substantial equality with its own citizens.

We concede that *McDonald v. Mabee* and *Michigan Trust Company v. Ferry* are correctly decided, but the language used therein can only apply to the situations before the Court. In the *Ferry* case it is evident that the State could not have enforced its mandates on Ferry at the time the decree was issued. Its execution would not run into other states. We do not believe that the fact that Doherty was never in Iowa is conclusive against Appellee.

York was not in Texas, Higginson was not in Pennsylvania and the New England Road Machinery Company was not in New Hampshire. King, Doherty's *alter ego*, was in Iowa. So long as it is not claimed that the judgment depends upon physical power rather than upon consent and

obligation, Doherty's physical presence is immaterial. The assertion is made that Doherty never used anything of Iowa's—never used anything in Iowa. This we deny. The validity of his contracts, the safety of his agents and the protection of any property he might have had in Iowa, regardless of the amount or extent thereof, were established and protected by the laws of Iowa. Certainly Appellant would not contend that Doherty's agents in Iowa were outlaws and that Doherty had no rights that he could enforce in the Courts of Iowa.

Flexner v. Farson is cited. We concede that the language in this case sustains Appellant's contentions. However, since the decision in *Flexner v. Farson, Hess v. Pawloski* has been decided. The language in *Flexner v. Farson* would not have permitted the conclusion reached in *Hess v. Pawloski.* Further, *Flexner v. Farson* is distinguishable upon the facts.

1. The agent was not in the service of the defendants at the time process was served upon him.

2. The Kentucky statute applied only to non-residents and, therefore, was discriminatory and stricken down by Section 2 of Article IV of the Constitution and the 14th Amendment to the Constitution.

3. Kentucky required a personal service upon residents. Iowa permits a substituted service upon residents. Section 3518 Code of 1897.

4. The Kentucky statute made no distinction between causes of action arising within the state and causes of action arising elsewhere. Under the rule laid down in *Old Wayne Life Assoc. v. McDonough,* 204 U. S. 8 and *Simon v. Southern Railway Company,* 236 U. S. 115 this was sufficient to strike down the statute.

See Austin W. Scott "Jurisdiction over non-residents doing business within a State" 32 Harvard Law Review 889. See Culp Process and Actions against non-residents doing

business within the State, 32 Michigan Law Review at 918.

The same reasoning as distinguishes *Flexner v. Farson* also distinguishes *Brooks v. Dun, Mordock v. Kirby* and *Ralya Market Company v. Armour & Company.* Further the Court in *Ralya Market Company v. Armour & Company* held the service good against the co-partnership, thus being in accord with *Sugg v. Thornton,* 132 U. S. 524, 33 Law Ed. 447. *New York Life Ins. Company v. Dunlavey* has no application to the case at bar. Mrs. Dunlavey did not have an agent in Pennsylvania upon whom service might be made. See *Stoner v. Higginson, Supra.*

We submit that the decision of the Supreme Court of Iowa is correct and should be affirmed.

We further pray the Court that in case of affirmance that it hold open its judgment for taxation of attorneys' fees in such amount as is reasonable in accordance with the provisions of Section 8581 C-18 of the Code of Iowa 1927.

Respectfully submitted,

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APPENDIX.

Code of Iowa, 1927 Section 8581 c-18:

"Remedies. Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser and the person making such sale or contract for sale and every director, officer or agent of or for such seller who shall have personally participated in making such sales and at the time knew of such violations shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller in person or in open court of the securities sold or of the contract made for the full amount paid by such purchaser, together with all taxable court costs and reasonable attorneys' fees in any action or tender under this section;"